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No. 86-1004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TECHNOGRAPH LIQUIDATING TRUST,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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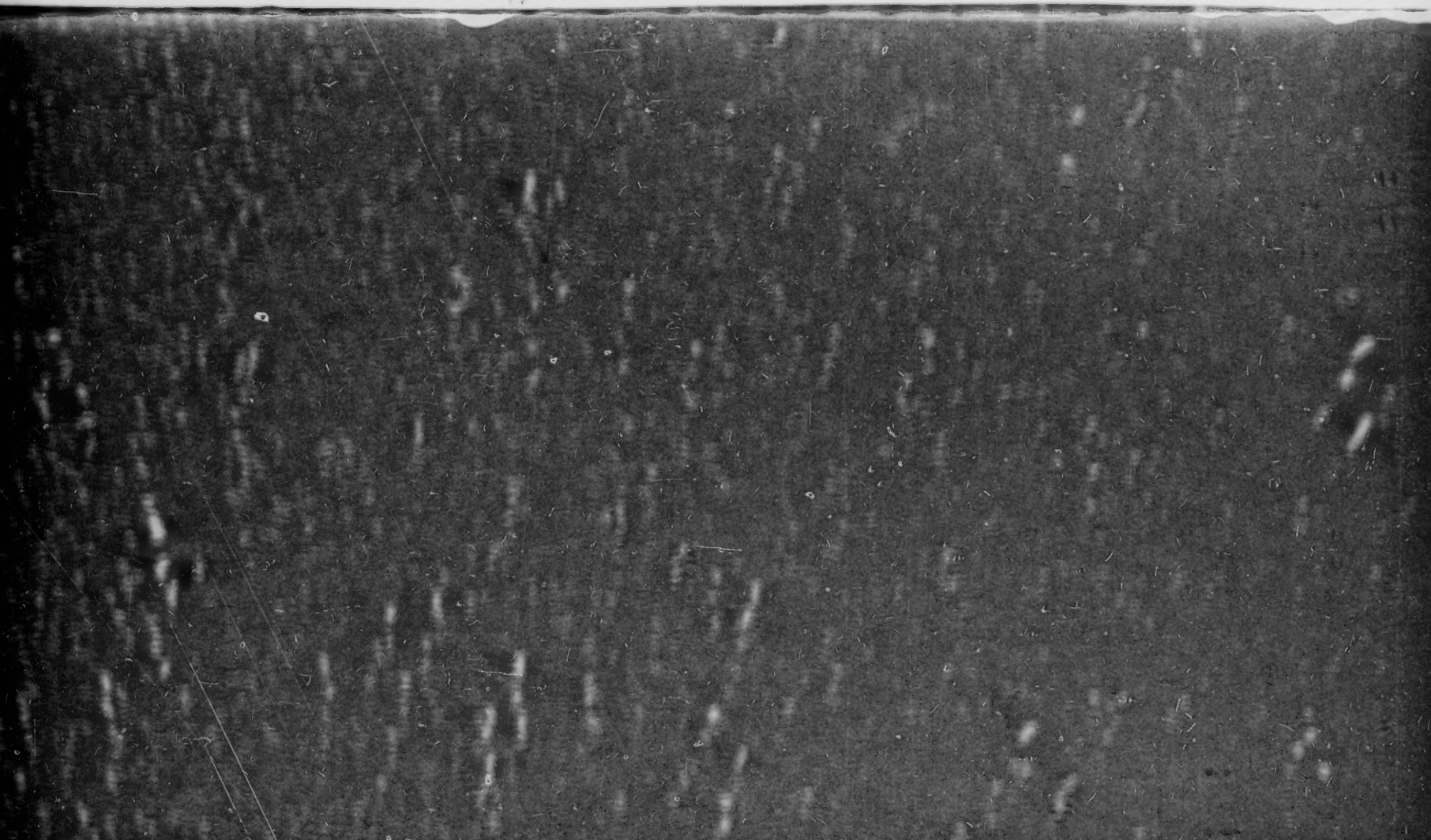
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QUESTIONS PRESENTED
(Affirmatively Stated)

1. The decision below will not affect anyone other than the parties to this thirty year old lawsuit. Even incorrectly assuming that this litigation still contains issues arising under the patent statutes, a decision on the jurisdictional question of whether the appeal should be heard by the U.S. Court of Appeals for the Federal Circuit or the U.S. Court of Appeals for the Third Circuit deals with a vanishing (or vanished) type of case, i.e., patent litigation where an appeal was taken to a regional court of appeals prior to the 1982 establishment of the Federal Circuit, where there was a remand for further proceedings and then another appeal was filed after the 1982 establishment of the Federal Circuit. The facts of this case do not lend themselves to a definitive ruling by the U.S. Supreme Court establishing bright line boundaries for the jurisdiction of the Federal Circuit. Thus, the issues raised in the Petition are of no public importance and the Petition should be denied. *See*, *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955).

2. The subject of the Petition for Certiorari is an interlocutory transfer order. Consequently, in addition to the normally heavy burden which must be met to obtain the grant of a certiorari petition, petitioner has a still further burden of showing truly extraordinary circumstances justifying certiorari on a non-final order. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967). That burden has not even been approached here.

3. The Federal Circuit was correct in transferring the appeal to the Third Circuit pursuant to 28 U.S.C. §1631 because there was no jurisdiction in the Federal Circuit, all patent issues in the litigation having been finally adjudicated years ago. Also, as required by § 1631, it was in the interest of justice to transfer the case to the Third Circuit because the Third Circuit has already decided three previous appeals in this litigation involving patent and non-patent issues.

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OPINIONS BELOW, JURISDICTION, AND STATUTES INVOLVED

General Motors agrees with petitioner's recitation of the Opinions below, the jurisdiction of this Court and the statutes involved, except that General Motors disagrees with petitioner's interpretation of some of these statutes and its suggestion that there continue to be any issues arising under the patent statutes in this lawsuit (Petition, pp. 1, 3).

STATEMENT OF THE CASE

Petitioner's present appeal from the latest decision of the U.S. District Court for the District of Delaware

was filed in the U.S. Court of Appeals for the Federal Circuit, and General Motors' motion under 28 U.S.C. §1631 to transfer the appeal to the U.S. Court of Appeals for the Third Circuit was granted by the Federal Circuit. Petitioner's motion in the Federal Circuit for reargument of the transfer motion and its suggestion that the motion be reheard en banc were each denied. Petitioner's motion in the Third Circuit seeking transfer back to the Federal Circuit was also denied. (Appendices A-E to the Petition).

The subject matter of petitioner's appeal from the District Court deals with (1) the non-patent issue of whether petitioner is entitled to additional interest on post-judgment interest paid into Court by General Motors and (2) reconsideration of the already finally adjudicated question of whether petitioner was entitled to damages relating to General Motors' production of non-bumper parts.

The U.S. Court of Appeals for the Third Circuit has already heard and decided the following three appeals from the U.S. District Court for the District of Delaware in this thirty year old litigation:

1. *Devex Corp. v. General Motors Corp.*, 467 F.2d 257 (3d Cir. 1972), *cert. denied*, 411 U.S. 973 (1973) ruled on patent infringement issues.

2. *Devex Corp. v. General Motors Corp.*, 667 F.2d 347 (3d Cir. 1981) affirmed the District Court's "Final Judgment" awarding over $8.8 million for bumper part infringements, over $11 million in prejudgment interest and denying damages relating to non-bumper parts. Certiorari was granted on the prejudgment interest issue and the Third Circuit's decision was affirmed by this Court, *General Motors Corp v. Devex*

Corp., 461 U.S. 648 (1983). Certiorari was denied the present petitioner on the non-bumper parts damages issue, 456 U.S. 988 (1982).

3. *Devex Corp. v. General Motors Corp.*, 749 F.2d 1020 (3d Cir. 1984) affirmed a ruling awarding petitioner over $7 million in post-judgment interest and interest on costs and denying petitioner compound interest on the post-judgment interest. This appeal was decided by the Third Circuit even though the Federal Circuit was in existence at the time the appeal was filed. Petitioner concedes that the Third Circuit had jurisdiction over this appeal because "[t]here were no patent law issues involved in that appeal" (Petition, p. 4). Certiorari was denied on petitioner's attempt to obtain compound interest on post-judgment interest and also on petitioner's attempt to reopen the issue of damages for non-bumper parts infringement, ___U.S. ___, 106 S.Ct. 68 (1985). In addition to the petition for certiorari, petitioner also filed a "Motion for Leave to File Out-of-Time Petition for Rehearing" on the non-bumper parts damages issue. This was also denied. 54 USLW 3228 (October 7, 1985).

Early in 1986, petitioner filed a motion in the U.S. District Court for the District of Delaware seeking additional interest on the post-judgment interest judgment and the interest on cost judgment General Motors had paid into the District Court in 1983, pending the appeal on these matters to the Third Circuit. Since the District Court still supposedly had this tag-end interest issue before it, petitioner also suggested that the District Court had the power to re-examine the long-since finally decided non-bumper parts damages issue. Petitioner's motions were denied by the District

Court on June 27, 1986. The District Court noted in its Opinion that this litigation "threatens to outlast all human participants" (Appendix F to the Petition; p. 8a).

As noted, petitioner appealed to the U.S. Court of Appeals for the Federal Circuit and General Motors' motion under 28 U.S.C. §1631 to transfer to the Third Circuit was granted. Petitioner's motion for reargument and suggestion that the motion be reheard en banc were each denied as was petitioner's motion in the Third Circuit to transfer the case back to the Federal Circuit.

REASONS FOR DENYING THE WRIT

1.

The transfer by the Federal Circuit to the Third Circuit and the Third Circuit's refusal to transfer the case back to the Federal Circuit affects no one but the parties to this lawsuit and will not serve as precedent for future cases. The Third Circuit decided two appeals in this case prior to 1982 dealing with infringement, damages and prejudgment interest. One of these appeals included the non-bumper parts damages issue. The Third Circuit also heard an appeal in 1984 dealing with post-judgment interest. Since October 1982, the Federal Circuit has had jurisdiction over appeals in cases from federal district courts involving continuing issues of patent law. The factual situation in this case where appeals were heard on patent issues by a regional court of appeals prior to 1982 and still further appeals are filed after 1982 is unlikely to occur again as we move further in time from 1982.

The facts of this case do not present the Supreme Court with an opportunity to draw a clear line for future cases between the jurisdiction of the Federal Circuit and the jurisdiction of the regional courts of appeal. The issues raised in the Petition are of no public importance and do not warrant review by the Supreme Court. *See Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955).

2.

The subject of the Petition for Certiorari is an interlocutory transfer order. Thus, in addition to the normally heavy burden which must be met to obtain the grant of a certiorari petition, petitioner has a still further burden of showing truly extraordinary circumstances justifying certiorari on a non-final order. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967). That burden has not even been approached here.

3.

As stated above, whether right or wrong, the rulings of both the Federal Circuit and Third Circuit that the appeal should be decided by the Third Circuit do not deal with issues worthy of certiorari. The fact is, however, that the decisions by the Federal Circuit and the Third Circuit are clearly correct, for the reasons which follow, and nothing would be served by the grant of a petition for certiorari in this case.

a. No unadjudicated issues arising under the patent statutes remain in this case, since all patent issues were finally adjudicated years ago. While the case

contained substantial patent issues for a long time, there are none now present. The Third Circuit decided the non-bumper parts damages issue in 1981 and certiorari thereon was denied in 1982. Certiorari was again denied on the same issue in 1985 as was a "Petition for Leave to File Out-of-Time Petition for Rehearing" on the earlier denial of certiorari.

The Federal Circuit has no jurisdiction over appeals if issues arising under the patent statutes are no longer in the case or if such issues are trivial or frivolous or immaterial. *USM Corporation v. SPS Technologies, Inc.*, 770 F.2d 1035 (Fed.Cir. 1985); *Atari, Inc. v. JS & A Group, Inc.*, 747 F.2d 1422 (Fed.Cir. 1984); 1982 *U.S. Code Cong. & Adm. News*, pp. 11, 29, 30.

In *USM Corporation, Id.* at 1037, the appeal was properly transferred from the Federal Circuit to the Seventh Circuit because "all patent claims had been finally adjudicated well in advance of the issue presently on appeal." The non-bumper parts damages issue which was in the instant case is not by any realistic standard continuing, and its attempted revisiting after final determination years ago is trivial, frivolous and immaterial. The other issue on appeal is a post-judgment interest question which even petitioner does not contend has anything to do with patents (Petition, pp. 5, 8).

Petitioner criticizes the Federal Circuit for transferring this case to the Third Circuit in the interest of judicial efficiency when 28 U.S.C. §1631 speaks of transferring where there is a "want of jurisdiction, . . . if it is in the interest of justice . . ." (Petition, p. 10). The Federal Circuit, having dealt with 28 U.S.C. §1631 many times, is obviously aware of its

requirements. What the Federal Circuit did here in its less than two page Order is the same thing it did in *USM Corporation, Id.* (which was cited in the two-page Order), where it spelled out its lack of jurisdiction in an opinion.

In *USM Corporation, Id.*, the Federal Circuit phrased the issue quite properly to be whether it had jurisdiction (770 F.2d at 1036):

> This appeal raises the question of our jurisdiction over an appeal where the Seventh Circuit has finally adjudicated all patent issues and only non-patent issues remain, in a case where the jurisdiction of the district court was originally based, in part, upon 28 U.S.C. §1338(a). (emphasis added).

This question was appropriately resolved, as here, by considering judicial efficiency (770 F.2d at 1037):

> Policies of judicial efficiency favor transferring the appeal to the Seventh Circuit. This case has already been before the Seventh Circuit twice on appeal with many of the underlying issues fully briefed by the parties to that court.

What petitioner is attempting here would decimate the law established in *USM Corporation*, 770 F.2d 1035 and the purpose for which the Federal Circuit was established. The plaintiff in *USM Corporation* could also have suggested that once any aspect of a case remains open—no matter how tag-end, minor or severable—everything that occurred in the case from its beginning is fair game for reconsideration. Such a suggestion, however, is impractical, illogical and contrary to existing law.

The Federal Circuit in *Atari, Inc. v. JS & A Group, Inc.*, 747 F.2d 1422 (Fed.Cir. 1984) correctly made it clear that in appropriate situations it could rule it had no jurisdiction based on considerations such as judicial efficiency (*Id.* at 1428, 1429):

> The present motion enables the court, with the appreciated cooperation of ten *amici*, to respond in part to Congress' expectation that it would formulate appropriate standards for determining jurisdiction.
>
> * * *
>
> That this court upholds its jurisdiction here does not preclude a contrary holding in future, different cases. Nor does it preclude transfer under 28 U.S.C. §1631 of an appeal so devoid of patent issues, present or potential, as to suggest transfer. Federal courts have declined jurisdiction over pendent and ancillary claims in the interest of "judicial economy, convenience, and fairness to litigants." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). (emphasis added).

b. Petitioner's citations are not in point:

i. In *Central Soya Co. Inc. v. Geo. A. Hormel & Co.*, 723 F.2d 1573 (Fed.Cir. 1983) (Petition, pp. 7, 8) the Tenth Circuit heard the appeal from the District Court's patent liability ruling but the appeal from the subsequent patent accounting trial was properly directed to the then newly created Federal Circuit. In *Central Soya*, contrary to this case, there had not been a final adjudication of all issues arising under

the patent statutes, so the post 1982 appeal clearly belonged in the Federal Circuit. In the present case, petitioner went into the District Court on a tag-end general law issue of whether it was entitled to additional interest on money previously deposited in the District Court to satisfy a judgment. Petitioner added to this issue a piggy-back motion for reconsideration of the long-ago finally adjudicated non-bumper patent issue. This transparent attempt to resurrect a spurious patent issue which is incapable of resurrection does not transfer to the Federal Circuit exclusive jurisdiction over the appeal from the Third Circuit which has already finally decided three appeals in this case.

ii. *Albert v. Kevex Corp.*, 729 F.2d 575 (Fed.Cir. 1984) (Petition, p. 7) is of no help to petitioner because there, "two patent infringement counts remained to be adjudicated in district court." All patent counts in the instant case were finally decided years ago.

iii. Petitioner's reliance (Petition, pp. 8, 9) on the Seventh Circuit's ruling in *Christianson v. Colt Industries Operating Corp.*, 798 F.2d 1051 (7th Cir. 1986) is also misplaced. Colt had been sued under the antitrust laws in a Complaint which the Seventh Circuit felt necessarily included within its scope important patent issues. The linchpin of the District Court's 1984 ruling being appealed was that nine patents of Colt did not meet the "best mode" requirements of 35 U.S.C. §112 so they "were invalid ab initio." There had never "been a prior plenary appellate decision on the merits." Consequently, the Seventh Circuit was of the opinion that the appeal included many still existing substantial issues which "arose under" the

patent laws which should be decided by the Federal Circuit (*Id.* at 1062).

The *Christianson v. Colt* situation is in stark contrast to our case in which all patent issues have been finally adjudicated. Also, in *Christianson v. Colt*, there was a dispute between the Federal Circuit and the Seventh Circuit as to which Court had jurisdiction over the appeal. In the instant case, the Federal Circuit and the Third Circuit are in complete agreement that the appeal should be in the Third Circuit.

If *Christianson v. Colt* (argued in the Federal Circuit on October 6, 1986 and not yet decided) is going to sow the seeds for "endless disputes" (Petition, pp. 9, 10) between the Federal Circuit and other federal courts of appeal regarding jurisdiction over some appeals, that is perhaps the case for certiorari. The present case is thirty years old and is too exhausted to sow any seeds.

CONCLUSION

For the reasons stated above, the Petition should be denied.

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